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# INTERNATIONAL COUNTERTRADE

## Draft chapters of legal guide on drawing up contracts in international countertrade transactions**

## Report of the Secretary-General

## Addendum

## DRAFT ILLUSTRATIVE PROVISIONS

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**The text contained herein is a first draft prepared by the Secretariat for consideration by the Working Group on International Payments as part of the preparatory work on the draft legal guide on drawing up contracts in international countertrade transactions and should not be regarded as stating the views of the Working Group.

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## INTRODUCTION

1. At the twenty-third session of the Commission (1990), it was suggested that illustrative contract provisions should be included in the legal guide in order to facilitate its use (A/45/17, annex I, paragraph 6). The present addendum has been prepared pursuant to that suggestion.

2. The preparation of the illustrative provisions contained in the present addendum has been influenced by the following considerations. Firstly, the draft chapters of the legal guide discuss possible contractual solutions in such a way that the reader can derive from the draft chapters guidance to drafting clauses for a countertrade agreement. Secondly, illustrative provisions must of necessity be drafted in a general manner and may therefore not take into account the actual circumstances in a given countertrade transaction. These considerations reduce the number of illustrative provisions that can usefully be added to the legal guide.

3. The Working Group may wish to consider the advisability of including in the legal guide illustrative provisions such as the ones presented here.

4. If the Working Group decides that illustrative provisions should be included in the legal guide, it is suggested that they be presented in footnotes to the text of the legal guide, and that the following explanation be included in chapter I, "Introduction to Legal Guide":

> "Illustrative provisions
>
> Some chapters of the Legal Guide contain one or more 'illustrative provisions' set forth in footnotes. They are included in order to make issues discussed in the text of a chapter easier to understand. They also serve to illustrate how certain solutions discussed in the text might be structured. Illustrative provisions have not been included where an understanding of an issue and guidance to drafting is clearly obtainable from the text of the chapter, or where a provision cannot be drafted in isolation from the particular countertrade transaction.
>
> It is emphasized that illustrative provisions should not necessarily be regarded as models for inclusion in particular agreements entered into by the parties. The precise content of a clause and language to be used in it is likely to vary with each countertrade transaction. In addition, there is usually more than one possible solution to an issue, even though only one of those possible solutions is presented in an illustrative provision. It is therefore important that parties who draft a provision based upon an illustrative provision carefully consider whether the provision fits harmoniously within their countertrade transaction."

## Chapter V. TYPE, QUALITY AND QUANTITY OF GOODS

Footnote to paragraph 13

Assuming that "X Company" is the supplier and "Y Company" is the party committed to purchase, the clause may read as follows:

"Goods offered for purchase under the countertrade agreement must:

(a) be fit for the purposes for which goods of the same description would ordinarily be used;

(b) be fit for any particular purpose expressly or impliedly made known to X Company at the time of the conclusion of the countertrade agreement;

(c) possess the qualities which X Company has held out to Y Company as a sample or model;

(d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods."

(The clause is modelled on article 35 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)).

## Chapter VI. PRICING OF GOODS

Footnote to paragraph 37

Assuming that the currency of payment is the Austrian Schilling and that the reference currency is the Swiss Franc, the clause may read as follows:

"If, on the date of actual payment, the exchange rate between the Austrian Schilling and the Swiss Franc is at variance from the exchange rate ... [specify exchange rate prevailing at a particular place] as it was on the date of conclusion of the countertrade agreement by more than ... [e.g, five per cent, or some other percentage specified by the parties], the price in Austrian Schillings shall be increased or decreased so that that price, as converted into Swiss Francs, would remain unchanged from the price as expressed in Swiss Francs on the date of conclusion of the countertrade agreement."

## Chapter VIII. PARTICIPATION OF THIRD PARTIES

Footnote to paragraph 10

Assuming that "Y Company" is the party committed to purchase, the clause may read as follows:

"Y Company is authorized to engage a third-party purchaser to make the purchases necessary to fulfil the countertrade commitment. In the event of such an engagement of a third party, Y Company remains liable for the fulfilment of the countertrade commitment."

Footnote to paragraph 16

Assuming that "Y Company" is the party committed to purchase, the clause may read as follows:

"Upon the engagement of a third-party purchaser, and upon the assumption by the third-party purchaser of the commitment to make the purchases necessary to fulfil the countertrade commitment as set forth in the countertrade agreement, Y Company will be released from liability for fulfilment of the countertrade commitment."

Footnote to paragraph 21

Assuming that "Z Company" is the third-party purchaser, "Y Company" is the party originally committed to purchase, and "X Company" is the supplier, the clause may read as follows:

"Z Company agrees to make the purchases necessary to fulfil the countertrade commitment set forth in the countertrade agreement between Y Company and X Company, a copy of which is attached to this contract. Z Company agrees to be bound by all the terms and conditions of that countertrade agreement, and in particular Z Company agrees to pay the liquidated damages stipulated in the countertrade agreement in the event Z Company fails to make the purchases necessary to fulfil the countertrade commitment."

The parties may wish to include the above provision in an agreement concluded by the party originally committed to purchase, by the third-party purchaser and by the supplier, in which the countertrade commitment is transferred to the third-party purchaser and the supplier consents to the transfer and to the release of the party originally committed from the countertrade commitment (see chapter VIII, paragraph 16). In such cases, the consent of the supplier to the release may be expressed in the following form:

"X Company consents to the assumption of the obligations under the countertrade agreement by Z Company and, when the assumption of those obligations becomes effective, to the release of Y Company from those obligations."

## Chapter X. RESTRICTIONS ON RESALE OF GOODS

Footnote to paragraph 9

Assuming that "Y Company" is the party purchasing goods pursuant to the countertrade agreement and that "X Company" is the supplier, the clause may read as follows:

"Y Company must inform X Company [alternative A:] of the resale of those goods; the information shall be given within ... days after the conclusion of the resale contract. [alternative B:] of the negotiations for the resale of the countertrade goods; Y Company shall give X Company [... days] [sufficient time] to make any observations or suggestions on the intended resale, and Y Company shall refrain from concluding the resale contract under negotiation before the expiry of that time period. [Both alternatives:] The information to be given must indicate ... [include some or all of the following: country, region within a country, or city to which the countertrade goods are to be shipped; place of business of the person to whom the goods are being resold; resale price; whether the countertrade goods have been re-marked or repackaged prior to resale and, if so, what packaging or marking has been used.]"

## Chapter XI. LIQUIDATED DAMAGES AND PENALTY CLAUSES

Footnote to paragraph 5

Assuming that "X Company" is the supplier, "Y Company" is the party committed to purchase, and the Austrian Schilling the currency of payment, the clause may read as follows:

[For failure to purchase goods]

"(1) If Y Company fails to make the purchases necessary to fulfil the countertrade commitment before the expiry of the period stipulated for the fulfilment of the countertrade commitment, Y Company will be obligated to pay to X Company an amount in Austrian Schillings equivalent to ... % of the unfulfilled portion of the countertrade commitment. Upon payment of that amount, Y Company will be released from the portion of the unfulfilled countertrade commitment for which the agreed sum was claimed.

(2) To the extent that the failure by Y Company results from a failure by X Company to make goods available in conformity with this countertrade agreement, paragraph (1) will not apply."

[For failure to supply goods]

"(1) If X Company fails to make the goods available for the fulfilment of the countertrade commitment before the expiry of the period stipulated for the fulfilment of the countertrade commitment, X Company will be obligated to pay to Y Company an amount in Austrian Schillings equivalent to ... per cent of the unfulfilled portion of the countertrade commitment. Upon payment of that amount, X Company will be released from the portion of the unfulfilled countertrade commitment for which the agreed sum was claimed.

(2) To the extent that the failure by X Company results from a failure by Y Company to fulfil its obligations under this countertrade agreement, paragraph (1) will not apply."

Footnote to paragraph 12 (provision that could be added to any liquidated damages or penalty clause)

"No damages are recoverable in addition to the agreed sum for the failure for which the agreed sum is payable."

Footnote to paragraph 22 (provision that could be added to any liquidated damages or penalty clause)

"If payment of the agreed sum becomes due in accordance with paragraph (1), the party entitled to claim the agreed sum has the right to deduct that sum, in whole or in part, from any payment due by that party to the party obligated to pay the agreed sum under [the following contracts only: ...] [any contract between the parties]."

## Chapter XIII. FAILURE TO COMPLETE COUNTERTRADE TRANSACTION

Footnote to paragraph 6

Assuming the "Y Company" is the party committed to purchase and that "X Company" is the supplier, the clause may read as follows:

[For release without additional period]

"If the X Company fails to accept a purchase order made by Y Company in accordance with this countertrade agreement [or a purchase order made by a third-party purchaser engaged by Y Company pursuant to this countertrade agreement], Y Company is entitled to declare the amount of the outstanding countertrade commitment reduced by the amount of the purchase order that was not accepted."

[For release with additional period]

"(1) [Same text as above]

(2) In order to avail itself of the right in paragraph (1) to declare the outstanding countertrade commitment reduced, Y Company must give X Company written notice specifying that the failure to accept the purchase order constituted a breach of the countertrade commitment and that the outstanding countertrade commitment will be reduced by the amount of the unaccepted purchase order if X Company does not make the goods available within the additional period of [e.g., 30 days]."

Footnote to paragraph 22

Assuming the "Y Company" is the party committed to purchase and that "X Company" is the supplier, the clause may read as follows:

"(1) [Y Company] [X Company] is exempt from the payment of damages, or of an agreed sum, in respect of a failure to fulfil its obligations under the countertrade agreement if that party proves that the failure was due to a physical or legal impediment beyond its control and that the party could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the countertrade agreement or to have avoided or overcome it or its consequences.

(2) The period for the fulfilment of the countertrade commitment will be extended by a period of time corresponding to the duration of the impediment. If the impediment lasts longer than [e.g., six months], [the party against which the impediment is claimed] [either party] may terminate the countertrade agreement by written notice."

Footnote to paragraph 24

[General definition of exempting impediment followed by illustrative or exhaustive list]

"(1) [Same text as in para. (1) of the illustrative provision to paragraph 22]

(2) [Illustrative list:] The following are examples of events that are to be regarded as exempting impediments, provided that those events satisfy the criteria set forth in paragraph (1): ... . [Exhaustive list:] Only the following events are to be regarded as exempting impediments, provided that those events satisfy the criteria set forth in paragraph (1)."

Footnote to paragraph 43

Assuming that "Y Company" is the exporter (counter-importer) and that "X Company" is the importer (counter-exporter), the clause would read as follows:

"A failure by Y Company to purchase goods pursuant to this countertrade agreement does not entitle X Company to suspend or withhold payment due by X Company to Y Company under the contract for the supply of ... ."

Footnote to paragraph 49, first sentence

"If a contract for the supply of goods in one direction is terminated, neither party is entitled, irrespective of the cause for the termination, to suspend conclusion of contracts in the other direction or to suspend or withhold performance of obligations under concluded contracts in the other direction."

Footnote to paragraph 49, second sentence

"If a contract for the supply of goods by X Company to Y Company concluded pursuant to this countertrade agreement is terminated, neither party is entitled, irrespective of the cause for the termination, to suspend or withhold performance under the contract for the supply of goods by Y Company to X Company."

## Chapter XIV. CHOICE OF LAW

Footnote to paragraph 20, second sentence (illustrative provision for the countertrade agreement and for a supply contract)

"The law of ... (specify a country or a particular territorial unit) [as in force on ... (specify date the countertrade agreement or the supply contract is entered into)] is to govern this ... (specify countertrade agreement or supply contract). [The rules of private international law of ... (specify the same country or territorial unit as above) do not apply.]"

Footnote to paragraph 20, fourth sentence (illustrative provision for the countertrade agreement and for a supply contract)

[Same as in footnote to paragraph 20, second sentence, with the addition, after the first sentence, of the following:] "The selected law governs in particular the formation of and validity of the contract and the consequences of its invalidity."

## Chapter XV. SETTLEMENT OF DISPUTES

Footnote to paragraph 12

The following model clause is recommended in the UNCITRAL Conciliation Rules:

"Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force."

Footnote to paragraph 28

The following clause is recommended in the UNCITRAL Arbitration Rules:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note - Parties may wish to consider adding:

(a) The appointing authority shall be ... (name of institution or person);
(b) The number of arbitrators shall be ... (one or three);
(c) The place of arbitration shall be ... (town or country);
(d) The language(s) to be used in the arbitral proceedings shall be ..."